SUPREME COURT, U.S.

FILED

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1489

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

901.89 ACRES OF LAND IN DAVIDSON
AND RUTHERFORD COUNTIES, TENNESSEE
AND H. E. JOHNSON, ET AL.,
LAWRENCE C. DAVENPORT, ET UX.
TRACT 1209
Defendants-Petitioners

SUPPLEMENTAL APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[fol. 1]

THE UNITED STATES OF AMERICA,
Plaintiff

v.

901.89 ACRES OF LAND, more or less, situate in Davidson County and Rutherford County, State of Tennessee, and H. E. Johnson, et al,
Defendants

TRACT NO. 1209
LAWRENCE C. DAVENPORT et ux,
LENA DAVENPORT

Civil No. 4418

REPORT OF THE COMMISSION

(Filed January 10, 1969)

Before Commissioners Fred Elledge, Jr., Chairman, Cletus McWilliams, and W. Harold Bigham.

TO THE HONORABLE WILLIAM E. MILLER, JUDGE:

This report is submitted in compliance with the consolidated order entered by the Court in this cause and others on May 6, 1968, appointing the undersigned as a Commission to determine the issue of just compensation to which the condemnees in all cases covered by the order are entitled.

The property involved in this proceeding fronts on both the Lavergne-Couchville Pike and Maxwell Road in the southeastern portion of Davidson County, Tennessee, and across Hurricane Creek from Rutherford County, Tennessee. The property was viewed by the Commission in the presence of the parties and their counsel on August 19, 1968, at which time the Commission familiarized itself with the general locale, terrain and character of the neighborhood. None of the subject property was inundated by the impoundment of the J. Percy Priest Dam and Reservoir Project at the time of viewing, although all the improvements had been removed since the date [fol. 2] of taking, April 5, 1966. The examination of the property was extremely helpful to the Commission in understanding the proof introduced before it. The cause was heard by the Commission on August 29, 1968, and a transcript of the hearing was filed with the Chairman of the Commission by the court reporter on November 27, 1968.

The subject property, consisting by stipulation of 144.80 acres, was taken in fee in connection with the construction of the J. Percy Priest Dam and the impoundment of J. Percy Priest Lake behind said dam. The total property consisting of 218.80 acres, a portion of which had been purchased by the landowners in 1933, another portion in 1957, and a final portion in the year prior to the date of taking, fronted approximately 1000 feet on the Lavergne-Couchville Pike, which said road was formerly known as Old Hickory Boulevard, and some three-quarters (3/4) of a mile on Maxwell Road. Hurricane Creek, which is at this point the boundary line between Davidson and Rutherford Counties ran along the rear of the property, with the subject property being on the east side of Hurricane Creek. The property taken by the Government in this proceeding is some two-

and-one-half miles from the Murfreesboro Pike, which is a main arterial highway in Davidson County, and some five-and-one-half miles from Interstate Highway 24 connecting Nashville and Chattanooga. The subject property is to the east of said interstate highway.

Although the property is in an area of Davidson County where thin soil cover is not uncommon and where outcroppings of rock abound, the undisputed proof shows that Mr. Davenport had over the years done a great deal of work to improve the subject property, and the property had deep soil for this part of the country. He had removed a great many rocks, and on the whole at the time the [fol. 3] property was taken by the Government, it was in good condition. A clear view of the location, topography and general character of the neighborhood can be obtained by the court from examining the aerial photograph placed in evidence, which was Government's Exhibit No. 2, as well as Government's Exhibit No. 4. The proof shows that the property is some sixteen miles from downtown Nashville.

Arriving at a decision in this case was complicated by the nature of the proof introduced. The Commission has concluded that the one expert witness put on by each party based his testimony on a false premise, and the Commission was placed in the position of trying to weigh testimony based on a false impression of the law. The confusion arose because of the fact that, when negotiations between the landowners and the United States began for the acquisition of the land, it was contemplated that all of the property owned by the landowners at this location would be taken. Later it was ascertained that some 24.85 acres would be severed and not acquired by the Government under its powers of eminent domain. *After* it was known

initially by the landowners that the property was to be taken and *before* the declaration of taking was filed on April 5, 1966, the landowners purchased 49 acres of additional property adjoining their property, and actually 74 acres of the property owned by the landowners were not taken when the declaration of taking was filed.

The landowners' expert witness, Mr. John J. Beck, appraised the property as though the property not taken consisted only of 24.85 acres, the part of the property not taken by the Government, but which was a portion of that land owned prior to the purchase of the landowners before the date of taking mentioned above. Because the 24.85 acres was interior and cut off from access to roads, Mr. Beck's "after value" was very low. On the other hand, Mr. Robert H. Stroube, the Government's only expert witness, although he did consider that there were 74 acres left after the taking, a proper conclusion in the Commission's opinion, in fixing the fair market value after the taking of the 74 acres, Mr. Stroube took into consideration reservoir enhancement, ostensibly on the assumption that the reservoir created by the Percy Priest Dam was of a direct and special benefit to the remaining property.

[fol. 4]

The landowners, through their counsel, vigorously objected to their client being charged by Mr. Stroube with reservoir enhancement in his determination as to the value of the remaining property. The Commission requested counsel for both parties to submit a memorandum brief on the question as to whether there should be an offsetting of benefits resulting from the government project against the value of the remaining land. This was done, and the Commission has studied the very able briefs carefully. All of the cases cited in these briefs by both parties are

apposite, to the extent that they deal with the distinction between general benefits accruing to all property in the neighborhood as a result of a Government improvement project and special and direct benefits which accrue to a specific piece of property which the Government is entitled to offset against the just compensation due the landowner as a result of the taking of a portion of his property. In the case at bar, the Commission concludes that the benefit of the Percy Priest Dam and Resevoir Project were general benefits which resulted in the enhancement and appreciation of value of property in the entire neighborhood, and that there were no special and direct benefits within the meaning of 33 U.S.C. § 595 or the cases which have been decided dealing with this question. As pointed out by the landowners, the remaining property [fol. 5] did not touch the Percy Priest Lake and Reservoir, and whatever benefit it enjoys as a result of the project, it is a benefit shared by it with all other property in the neighborhood.

As a consequence of this determination by the Commission, it is faced, as we pointed out above, with testimony by the two expert witnesses for the parties based upon an incorrect assumption as to the real situation with regard to the remaining property. The Commission has attempted to interpolate and compensate for this by examining and weighing all of the proof introduced.

The first witness for the landowners was Mr. Lawrence J. Davenport, who owns the property with his wife. As we have stated, Mr. Davenport purchased some 98 acres of the subject property in 1933, and in 1957 additional property was purchased, with the final increment of property being purchased prior to the date of taking. The property was fairly level and was sowed down in pasture.

Some four or five acres of it were subject to flooding from Hurricane Creek, according to Mr. Davenport's testimony.

At the time the property was taken on April 5, 1966, Mr. Davenport was using the property for permanent pasture and for hay. At that time he had some 40 or 50 head of cattle on the subject property. During World War II Mr. Davenport, who had always held a full-time outside job, other than farming, farmed the property in various crops. Mr. Davenport stated that he had spent a lot of time in building up the land, clearing it, and digging out rocks. He admitted that the property was "badly run down" when he bought it. According to Mr. Davenport's testimony he had never made any money on the property, but most of the profits had been plowed back into the land in the form of improvements.

[fol. 6] There were several improvements on the property, but none of them was of any outstanding character or nature. The house which contained five rooms and a bath with an unfinished upstairs, was built by Mr. Davenport in 1937. There was also a pond or lake of approximately one acre in size, which had been built through the Government "farm program". There was a barn built in the 1950's, along with a shed, chicken house and a smoke house. The testimony was undisputed that there was a very good well in which there was an electric pump and which was used not only to irrigate the garden and water the stock but also for domestic purposes in the house. There was another well on the property but not nearly as good as the one just described. On the tract of property purchased in 1957 there was an old log house and barn and a chicken house, with a very small pond. Even Mr. Davenport admitted that the improvements were in poor shape on this latter tract. The im-

provements are pictured in Collective Exhibit No. 1 for the landowners and also in Exhibit No. 5 for the Government.

Mr. Davenport thought that the fair market value of his property was $155,000 before the taking, and that the remaining property had a value of $5,000. Hence, Mr. Davenport thought the just compensation to which he is entitled as damages in this case was $155,000. Again, Mr. Davenport, as in the case of Mr. Beck, thought that the remaining property was only the 24.85 acres not taken by the Government and which were a part of the property owned as of 1957. As we have shown, this was in fact not the case, and it is impossible to tell to what extent, if any, Mr. Davenport would have adjusted his estimate, had he properly considered that there were in fact 74 acres of land remaining, and the 24.85 acres was indeed not landlocked, as he thought it was. Mr. Davenport's testimony was undercut to a considerable extent, other than the natural overexuberance of a landowner, by the fact that he admitted on cross-examination his fair market value figure was pretty much a "take it or leave it proposition". In other words, the figure testified to was the amount which he personally would insist on before he would sell the property. This, of course, is not necessarily the fair market value of the property.

[fol. 7]

The only expert witness to testify for the landowners was Mr. John J. Beck. Mr. Beck is 74 years old and maintains a real estate appraisal and brokerage firm at 922 Stahlman Building in Nashville, Tennessee. He has been doing appraisals in Davidson County for some 16 years and has appraised for large numbers of individuals, and as well for some condemning authorities. The Com-

mission finds Mr. Beck to be a fairly well informed witness, but deems his estimate as to value to be overly enthusiastic in this case. And, too, he did not include the 49 acres purchased by the landowners immediately prior to the date of taking either in assessing the before value of the property and in appraising the after value. Mr. Beck described the home on the subject property as being a "nice country home", and also stated that the general neighborhood was in a stage of rapid transition in which small tracts were being developed. He stated that comparable sales were very hard to find, and did not testify to any. This of course did not help his appraisal of the property with regards to its weight.

Mr. Beck thought the fair market value of the property was $109,000 before the taking, without the 49 acres, of course; and that its after value was $4,600. He specifically stated that the $4,600 figure referred to the 24.85 acres, and that he gave it a very low value because it was landlocked interior property. When asked, he stated that he would upgrade his "after" value $100 per acre if he had known it was not landlocked. This, of course, does not solve the dilemma of the Commission described above, since Mr. Beck gave no appraisal as to the fair market value of the 49 acres which was indeed left along with the 24.85 acres. Mr. Beck thought that the highest and best use of the property was to tract it into small acreage lots.

[fol. 8]

The only expert witness who testified for the Government was Mr. Robert H. Stroube, who is a full time appraiser-employee of the Corps of Engineers. Mr. Stroube thought that the highest and best use of the property was agricultural with a potential for small acreage tracts along the road frontage. Mr. Stroube has testified before the

Commission many times, and the Commission is aware that since 1964 he has done nothing but appraise properties in the area of the Percy Priest Dam and Reservoir Project. The Commission deems him to be a knowledgeable and helpful witness. Because he was apparently instructed to appraise the "after" value of the subject property considering the reservoir enhancement, his testimony is considerably undercut in the case at bar. The landowners insisted that the Commission should ignore his testimony altogether, but although the Commission gives it much less weight than it would otherwise do, it is felt that there is not sufficient warrant to ignore completely the testimony of Mr. Stroube. Indeed, by ignoring Mr. Stroube's comparable sales which were used to show the after value, and which did involve reservoir enhancement, Mr. Stroube's appraisal does become meaningful and helpful.

Mr. Stroube thought that the total amount of property owned by the landowners, 218.8 acres, had a fair market value on the date of taking of $80,000 and that the value of the 74 acres remaining, which did enjoy reser-
[fol. 9] voir enhancement value, was $30,000. Thus he thought that the fair market value of the property before the taking, with no reservoir enhancement value, was $366 per acre, and that its value after was $400 per acre.

Mr. Stroube testified rather extensively to sales of property which he thought comparable in the area. Those sales which occurred prior to the taking the Commission found to be very helpful, but those which were testified to with regard to the after value of the 74 acres have been ignored by the Commission, because they did enjoy reservoir enhancement value, and because the Commission has determined that the benefits of the Percy Priest Dam and

Reservoir Project were general only with regard to the remaining property of the landowner and that they were not special benefits.

The Commission believes that the highest and best use of the subject property was, as Mr. Stroube thought it would be, agricultural, with a potential for small acreage tracts on the road frontage. The general character and quality of the properties in the surrounding area were not extremely high. There were many very inexpensive homes built along the roads in the area, and the tracting or subdivision potential seemed to be rather remote.

Based upon its consideration of all the evidence adduced at the hearing on August 29, 1968, aided by personal examination of the property by the Commissioners in the presence of the parties and their attorneys on August 19, 1968, the Commission is of the opinion that Tract No. 1209, consisting of 218.80 acres, as of April 5, 1966, the date of taking, assuming a seller willing to sell, and a buyer wishing to buy, neither of whom was compelled to do so, had a fair market value of $97,000, [fol. 10] and that, assuming the same criteria, the 74 acres not acquired by the Government had a fair market value of $24,600, with the damage to the landowners occasioned by the taking being the difference between those two figures, or $72,400.00. Accordingly, the Commission reports the just compensation to which the landowners are entitled is $72,400.00.

This 10th day of January, 1969.

Respectfully submitted,

/s/ Fred Elledge, Jr.
Fred Elledge, Jr., Chairman

/s/ Cletus McWilliams
Cletus McWilliams, Commissioner

/s/ W Harold Bigham
W. Harold Bigham, Commissioner

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[fol. 1]

UNITED STATES OF AMERICA

v.

901.89 ACRES OF LAND, MORE OR LESS, SITUATE IN DAVIDSON AND RUTHERFORD COUNTIES, STATE OF TENNESSEE, AND H. E. JOHNSON, ET AL

TRACT NO. 1209 - LAWRENCE C. DAVENPORT ET UX

Civil No. 4418

ORDER

(Filed September 9, 1969)

In this action the Commission filed its report on January 10, 1969, fixing the just compensation to which the landowners are entitled for the taking in fee of 144.80 acres, in the sum of $72,400.00. The government filed exceptions to the report on February 17, 1969.

The Court has carefully examined the exceptions of the government in light of the transcript of the proceedings before the Commission, briefs of counsel, the report of the Commission itself, and the entire record, and is of the opinion that the objections are without merit and should be overruled. The Commission's report is exhaustive and demonstrates a careful consideration of the evidence and of the issues involved. The Court is satisfied that the Commission's report is supported by the evidence and that it is not clearly erroneous.

[fol. 2] It is, therefore, ORDERED and ADJUDGED that the exceptions to the report of the Commission interposed by the government be, and the same are, hereby overruled, that the Commission's report be, and the same is, hereby in all things confirmed, and that, pursuant to said report, the just compensation to which the landowners are entitled be, and the same is, hereby fixed in the sum of $72,400.00.

/s/ Wm. E. Miller
UNITED STATES DISTRICT JUDGE